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No. _____

In The

Supreme Court of the United States

RAYMOND E. PAWLOWSKI,

Petitioner,

v.

NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Railway Labor Act, 45 U.S.C. § 151 et seq., afford an employee the right to have a majority union representative present at his disciplinary hearing at the employee's request?

PARTIES

The parties are correctly identified on the title page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Raymond E. Pawlowski respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which is sought by this petition, is reported as *Raymond E. Pawlowski v. Northeast Illinois Regional Commuter Railroad Corporation*, 186 F.3d 997 (7th Cir. 1999) and is reprinted in the appendix of this petition at pages 1-14 (hereinafter cited as "App. ___"). The opinion of the United States District Court for the Northern District of Illinois is reported as *Raymond E. Pawlowski v. Northeast Illinois Regional Commuter Railroad Corporation*, 31 F.Supp.2d 1051 (N.D.Ill. 1998), and is reprinted in the appendix, App. 15-19.

JURISDICTION

Original jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1331 and 1337. Petitioner appealed this case to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291. On August 9, 1999, the Court of Appeals affirmed the District Court's decision and entered judgment

against Pawlowski. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

Section 151a of the Railway Labor Act (RLA), 45 U.S.C. § 151a, provides in pertinent part:

> The purposes of the chapter are: * * * (4) to provide the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 152 Second of the RLA, 45 U.S.C. § 152 Second, provides in pertinent part:

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Section 152 Third of the RLA, 45 U.S.C. § 152 Third, provides in pertinent part:

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any

> way interfere with, influence, or coerce the other in its choice of representatives. * * *

Section 152 Fourth of the RLA, 45 U.S.C. § 152 Fourth, provides in pertinent part:

> * * * *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, ...

Section 152 Sixth of the RLA, 45 U.S.C. § 152 Sixth, provides in pertinent part:

> In case of a dispute between a carrier or carriers and its or their employees arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held * * * *and provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Section 153 First of the RLA, 45 U.S.C. § 153 First, provides in pertinent part:

> There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided – * * * (i) The disputes between an employee or

group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. (j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

STATEMENT OF THE CASE

For approximately 20 years, Petitioner Raymond Pawlowski ("Pawlowski") has been employed as a police officer. During this time, he has received numerous commendations and awards for effective police work. On February 13, 1997, Pawlowski left his employment with Amtrak and was hired by the Respondent Northeast Illinois Regional Commuter Railroad Corporation ("Metra") which is a common carrier by rail and is subject to the terms and requirements of the Railway Labor Act, 45

U.S.C. § 151 et seq. ("RLA" or the "Act"). Prior to the events which form the basis for this matter, Pawlowski performed his job duties with Metra well and received more commendations from the public for his diligence, demeanor, and helpfulness.

The Railroad Special Agents & Police Officers Section, Allied Services Division/TCU, AFL-CIO ("Union") was the designated exclusive collective bargaining representative for Metra police officers below the rank of captain in Chicago at all times relevant to this matter. The Union had a collective bargaining agreement ("CBA") with Metra. The CBA was silent on whether a Metra employee who was employed for less than a year, as was Pawlowski, had a contractual right to a union representative at a disciplinary investigation, neither affirmatively granting nor prohibiting such a right. Upon becoming an employee of Metra, Pawlowski became a member of the Union and remained a member in good standing at all relevant times. As a Union member, Pawlowski paid union dues and was told and expected that, in return for his dues, the Union would be able to provide him with assistance in matters involving disciplinary actions if initiated by Metra against him.

On July 25, 1997, at the beginning of his work shift, Pawlowski was informed by his immediate supervisor that he was under internal investigation for violating Metra regulations by allegedly holding a gun he had received from a public citizen without reporting it. Specifically, he was told by his superior that "If it doesn't involve you, then you have nothing to worry about." Pawlowski proceeded to work his shift. Later, near the

end of his shift, Pawlowski was ordered to return immediately to headquarters. Arriving as ordered, he was directed to a closed room in which were present the Metra Chief of Police, as well as Pawlowski's District Commander, and his immediate supervisor.

Upon entering the room, Pawlowski requested the presence of his union representative or an attorney. Metra management denied his request. At no time was Pawlowski placed under arrest nor has he ever been accused or convicted of any criminal conduct. Despite making repeated requests for the presence of his union representative, Metra management threatened him with immediate dismissal if he left the interrogation hearing to seek such advice and continued to deny him the presence of the union representative. During the course of the hearing, he was subjected to threats, intimidation, and false and misleading statements. The Court below characterized Metra's conduct at the hearing as "heavy-handed, and may have violated the spirit, if not the terms, of the CBA [collective bargaining agreement]." App. at 13.

At the time of the investigative hearing, representatives of the Union were available to be present with Pawlowski had his requests been granted by Metra. Subsequently, the Union agreed that their representative should have been present and that they would have provided such a representative had they been notified.

The information elicited at this hearing resulted in Pawlowski's employment termination from Metra. Subsequent to the termination, the Union attempted to reverse the decision, but the attempts proved fruitless. Pawlowski was informed by the Union that it was closing

its files on the matter, that the decision to terminate would stand, and advised Pawlowski to take personal action, if any.

On March 30, 1999, Pawlowski filed this action alleging that his statutory right to union representation under the RLA was violated when Metra denied his request for the presence of his union representative at his disciplinary proceeding. Metra moved to dismiss the complaint for lack of jurisdiction or, in the alternative, for judgment on the pleadings. The District Court held that the RLA does not afford a statutory right to the presence of a union representative at a disciplinary hearing relying on the Seventh Circuit's holdings in *Edwards v. St. Louis-San Francisco R. Co.*, 361 F.2d 946 (7th Cir. 1966) and *Broady v. Illinois Cent. R. Co.*, 191 F.2d 73 (7th Cir. 1951), *cert. denied*, 342 U.S. 897 (1951) and reasoning that since the RLA allows an employee the right to have a representative of choice present during proceedings before the National Railroad Adjustment Board, then, by implication, the statute does not grant a similar right at an earlier stage which are governed only by the CBA. 45 U.S.C. § 153 First (j). App. 16-18.

On appeal, Pawlowski asked the Seventh Circuit to reverse the District Court decision by applying its detailed examination of the RLA in *McElroy v. Terminal Railroad Assoc.*, 392 F.2d 966 (7th Cir. 1968), which had held that RLA § 152 Second was intended by Congress to and did in fact grant an employee the right to representation at a disciplinary hearing of a representative of his choice from one of two co-majority unions. In addition, Pawlowski requested that the Seventh Circuit adhere to this Court's decisions in *Elgin, J. & E. Ry. Co. v. Burley*, 325

U.S. 711 (1945) *adhered to*, 327 U.S. 661 (1946) and *Landers v. National Railroad Passengers Co.*, 485 U.S. 653 (1988) (*"Landers"*) which also appeared to conclude that the RLA should be read to afford an employee the right to representation at disciplinary hearings by majority union representatives.

The Seventh Circuit agreed with Pawlowski that "[Section] 152 Second may well guarantee some right to union representation in dispute resolution conferences at the company level, . . . " App. 8. The Seventh Circuit acknowledged that its prior review of the legislative history of § 152 Second indicated that "on, its face, [§ 152 Second] guarantees an individual employee the right to prosecute his grievances through any representative of his choice." App. 8 n.4, quoting *McElroy v. Terminal Railroad Assoc.*, 392 F.2d at 969. However, although acknowledging that this Court's decision in *Landers, supra*, did not indicate that § 152 Second failed to guarantee an employee's right to majority union representation, nevertheless, the Seventh Circuit was hesitant to rely upon its prior precedent in light of *Landers* which held that § 152 Second did not afford an employee the right of minority union representation at a disciplinary hearing.

Noting that this Court in *Landers* affirmed the decision of the Fifth Circuit, the Seventh Circuit relied on language in the Fifth Circuit's decision and concluded that § 152 Second should be read to impose "only a general duty on railroads to afford their employees the opportunity to meet and discuss their grievances through a union representative." App. 10. The Seventh Circuit buttressed its decision by referring to § 152 Sixth of the RLA reasoning that the protection afforded employees for

"disputes" in § 152 Second was derivative from and subsequent to the protection afforded employees for "grievances" in § 152 Sixth. The Seventh Circuit posited that a dispute arises only after a grievance occurs and believed that Pawlowski had no dispute until "after Metra informed him that he was being terminated for having violated company rules and he filed a grievance (in the form of an appeal) with respect to that disciplinary action." App. 12-13. Since the Union represented him after the grievance occurred, the Seventh Circuit concluded that Pawlowski received all that the RLA afforded him. App. 13.

At present, Pawlowski has lost his employment, his pension, his medical coverage, his reputation, and his ability to find comparable employment. His 20 year sterling career is at an end.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Seventh Circuit has held that an employee has no right to the presence of a majority union representative at a disciplinary hearing. It reached this decision by construing the provisions of § 152 Second of the RLA as merely precatory (App. 10) and downplaying the importance of § 152 Third and Fourth. (App. 7-8.) Not only is the Seventh Circuit's decision in conflict with this Court's well settled precedent holding that § 152 Second imposes mandatory obligations on management and that, in order to have meaning, § 152 Second must be construed to allow an employee the right to a majority union representative at a

disciplinary hearing, but the decision below is in conflict with that Court's own well settled precedent, has been written in such a way as to cause confusion and spread uncertainty in the nation's jurisprudence which will lead to labor unrest and discord, and has the practical result of nullifying the statutory heart of the arbitration scheme created by Congress in the RLA. This case provides this Court with a most timely opportunity to clarify the RLA's remedial structure which Congress created to govern the activities of over 1,987,000 employees who work in the railroad and airline industries and will allow this Court to ensure continuing labor harmony in these, so vital, sectors of our nation's economy.

I. THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE REPRESENTATION RIGHTS OF LABOR WITHIN THE AIRLINE AND RAILROAD INDUSTRIES.

Metra refused to allow Pawlowski an opportunity to meet, to confer, and to seek advice from his legitimately selected majority union representative before Metra took adverse action against him. This conduct calls into question both the scope of the rights afforded to employees by the RLA as well as the legitimate expectations that unions may have in their ability to monitor violations of their collective bargaining agreements.

1. The circumstances of Metra's denial of Pawlowski's request for the presence of a union representative involves the most fundamental rights protected by the RLA. Legislative history clearly sets forth that the RLA was the first major national piece of successful labor

legislation enacted with the purpose of averting industrial strife in the railroads and airlines. *Brotherhood of Ry. & S.S. Clerks v. Assoc. For the Benefit of Non-Contract Employees,* 380 U.S. 650, 659 (1965); 45 U.S.C. § 151a(1). The RLA was the culmination of various previous laws which had failed to achieve labor harmony principally because those prior laws were construed not to impose affirmative enforceable duties requiring unions and carriers to negotiate. See e.g., Newlands Act, ch. 6, 38 Stat. 103 (1913); Transportation Act of 1920, Ch. 91, 41 Stat. 456 (1920). See generally, *Aaron, The Railway Labor Act at Fifty; Collective Bargaining in the Railroad and Airline Industries 2 (C. Rehmus 2d ed. 1977).* "Deadlock became the common practice, making decisions impossible. The result was a complete breakdown in the practical working of the machinery. Grievances accumulated and stagnated until the mass assumed the proportions of a major dispute." *Elgin, J. & E Ry. v. Burley,* 325 U.S. 711, 726 (1945) (hereafter cited as *"Burley I"*), *adhered to,* 327 U.S. 661 (1946) (hereafter cited as *"Burley II"*). Congress intended the RLA to aid in the peaceful settlement of labor disputes by mandating that negotiations occur between the representatives of the carrier and the employee. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 377, *reh'g denied,* 394 U.S. 1024 (1969).

From a very early time, this Court has recognized Congress' intent that the RLA correct the deficiencies of past legislation by affirming that Section 152 Second of the RLA which, on its face, requires a meeting of carrier and union representatives at the earliest practicable moment to resolve differences, in fact meant and was to be enforced as written. "It is, we think, not open to doubt

that Congress intended that this requirement [Section 152 Second] be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts." *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 548 (1937). This Court has further recognized that while Congress in the RLA could not compel agreement between parties, it was intended to "command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representatives of its employees, to listen to their complaints, to make reasonable efforts to compose differences – in short, to enter into a negotiation for the settlement of labor disputes . . . . " *Id.* at 548. Accord *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 200 (1944); *Burley I*, at 721, n. 12.

The Seventh Circuit in this case has overruled this Court's long standing precedent with the effect, as we near the end of this century, of turning the clock on carrier labor-management relations back to the state that existed at its beginning. While the Court below acknowledged that Section 152 Second must have some meaning, it read the meaning so narrowly as to constitute no more than an admonition or an encouragement to employers to meet with employees thereby transforming § 152 Second into a hollow right without substance. The statutory language currently found in § 152 Second was also contained in Title 3 of the former Transportation Act of 1920, Ch. 91, 41 Stat. 456, 469 (1920). This Court in *Pennsylvania Railroad System & Allied Lines Federation v. Pennsylvania R. Co.*, 267 U.S. 219 (1925) construed the original language of the Transportation Act in the same way that the Seventh Circuit below has now construed the language of § 152

Second; namely as creating only general duties with no specific content. However, when Congress rejected the effect that the *Pennsylvania Railroad System* decision had on the operation of the rails and enacted the RLA to replace the Transportation Act, this Court acknowledged that although Congress may have retained some of the language of the old Transportation Act in the RLA at § 152 Second, Congress now intended that the language of § 152 Second have meaning and be enforceable. *Virginian Ry. Co. v. System Federation No. 40,* 300 U.S. 515 (1937).

In *Burley I,* 325 U.S. at 721, n.12 this Court specifically advised lower courts against construing § 152 Second to be merely precatory as did the Court below:

> Thus, one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. [Citations omitted] This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it.

The directives of this Court in *Burley I* were uncommented upon by the Court below. The practical effect of the decision is equivalent to finding Section 152 Second unconstitutional by reading it in such a way as to make it superfluous. Most recently, this Court in *Kawaauhau v. Geiger,* 523 U.S. 37 (1998) advised lower courts to avoid adopting an interpretation of a statutory provision which renders the provision superfluous. The decision below has had just that result and should be reviewed to prevent that result.

2. The issue presented here is not merely one which addresses the integrity of this Court's prior decisions, but

has broad and immediate nationwide impact. Bureau of Labor statistics indicate that over 1,987,000 people are employed in the rail and airline industries. Over 150,000,000 airline passengers fly each year. The bulk of our national raw material and industrial output travel internally by rail. The decision below will effect all those employees because § 152 Second is the cornerstone of the multi-step arbitration process created by Congress to resolve labor differences in the rail and airline industries.

The RLA envisions that all disputes, major or minor, begin with a dispute resolution stage, that is, a jawboning stage. Should the negotiation stage prove fruitless, the level of formality increases to the grievance process which is handled in the usual manner up to and including the chief operating officer. 45 U.S.C. § 152 Sixth, § 153 First (i). Lastly, if the dispute still cannot be resolved, the parties can seek arbitration before the Adjustment Board. 45 U.S.C. § 153 First (j). By concluding that the protection of the RLA begins with the filing of the grievance and not before, the Seventh Circuit has removed the first step in the process.

The effect of removing § 152 Second protections go beyond merely the situation where employees may be subject to dismissal, as occured to the Petitioner. It extends to any conceivable difference between labor and management. Under the Seventh Circuit's view of the RLA, a dispute does not arise until after a grievance exists. App. 12. Of course, under the RLA, the CBA governs the relationship between the parties, which, applying to the Court's reasoning below, results in the RLA affording an employee no independent protection.

The necessary result of the decision is to impose a procrustean burden upon a dispute resolution mechanism meant to be swift, informal and non-contentious. If the decision below stands, any dispute, no matter the nature, cannot be resolved informally. Instead a formal grievance must be filed with its associated delays, costs, and increased tensions. The RLA was designed with the view that "in every dispute men of good faith must in good faith get together in sincere effort to resolve their differences." *Long Island R. Co. v. System Federation No. 156, Am. Federation of Labor,* 289 F.Supp. 119 (E.D.N.Y. 1968). The Act seeks to promote a labor climate of fairness, harmony and predictability. *Roberts v. Lehigh & N.E. Ry. Co.,* 211 F.Supp. 379, 382 (E.D.Pa. 1962), *aff'd,* 323 F.2d 219 (1963). The decision below calcifies the process by requiring any dispute to become a grievance. It will have an inevitable effect of chilling the current openness of communication that has developed in the rail and airline industries by allowing management to dismiss informal negotiations and insist on the filing of a grievance before the parties talk. The decision below molds a new RLA that is the very antithesis of Congressional intent. The impact of the decision will be felt each and every day by the nearly two million people who currently operate under it. Their interests, as well as the overall interest in the smooth functioning of the rail and airline industries, support the granting of this petition.

3. By holding that Pawlowski cannot receive representation from or make contact with his majority union representative, the Seventh Circuit has imperiled the position of the majority union to perform its carefully protected function in labor-management relations. A

review of the RLA's amendments indicates a consistent congressional interest in preserving the bargaining power and position of majority unions in the handling of all disputes. See generally, *The Railway Labor Act: The Employee's Right to Minority Representation at Company Grievance Hearings*, 11 W. New. Eng. L. Rev. 27 (1989). This Court recognized the importance of majority union representation at disciplinary hearings in *Landers v. National Railroad Passenger Corp.*, 485 U.S. 652, 657 (1988): "A majority union's prosecution of employee grievances and defense of employee disciplinary charges complement its status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract." That ability to correct and monitor contract violations was imperiled when Metra refused to allow a representative of the majority union to appear and observe how the hearing of Pawlowski was conducted. The union could not become aware, except by hearsay, of what may have transpired to one of its members. It was deprived of an opportunity to perform its role of watchdog in the collective bargaining scheme when it was denied the opportunity to watch.

Section 152 Third of the RLA, 45 U.S.C. § 152 Third, protects the right of employees from interference with the designation of their representatives. This statutory section was critical to the formation of the RLA in order to guaranty employees a right freely, and without coercion, to select their representatives. The Court below dispensed with consideration of this statutory section arguing that it only referred to collective bargaining representation. App. 7 n.3. However, the Seventh Circuit erred by taking an unduly narrow interpretation of the rights afforded by

Section 152 Third. At its heart that section protects an employee's right to contact and appoint his representatives without discussing the context or the purpose for which the representation is to be made. Indeed, the Seventh Circuit has, at other times, agreed that Section 152 Third was intended, among other matters, to guaranty that an employee could choose representatives in the resolution of disputes with management without fear of coercion. See *McElroy v. Terminal Railroad Association of St. Louis*, 392 F.2d 966 (7th Cir. 1968). Here, Metra interfered with Pawlowski's right to select the majority union representative to represent him. Indeed, he was threatened with termination if he saw his representative. Metra's conduct here is not far removed from the conduct of rail carriers 80 years ago when they threatened employees with immediate termination if they met with or sought union representation. That attitude by management led to bloody confrontations over the right to be represented by the person of one's choice and was put to rest decades ago. There is no reason to revive its bones in the current era.

Similarly, Section 152 Fourth of the RLA, prohibits an employer from preventing an employee "individually, or local representative of employees from conferring with management during working hours . . . " 45 U.S.C. § 152 Fourth. This Court in *Burley I* held that although the language may appear, at first blush, only to limit an employer's giving financial aid to employees in an effort to influence their union affiliations, nevertheless, "the language clearly contemplates also that the individually employee's right to confer with the management about his own grievances is preserved." 325 U.S. at 735. By

allowing Metra to deny Pawlowski the opportunity to confer with his management through his representative during working hours, the decision below reverses the protection afforded employees by Section 152 Fourth.

In sum, by attempting to nullify the ability of an employee to contact or to request the presence of a majority union representative to observe management activity, the decision of the Seventh Circuit below has ravaged labor-management relations. Applying the reasoning of the decision, management can now exclude any majority union representative from any interaction with its management until a "grievance" has been filed. The majority union will be substantially impaired in its ability to monitor whether its contract with management is being fairly implemented. Furthermore, the very right to be safe as a union member is threatened, since, under the decision below, management can deny, intimidate, and threaten with impunity the immediate dismissal of any employee who requests the presence of his union representative or who seeks to take time to contact his union representative on a labor matter prior to the filing of a grievance. The petition for a writ of certiorari should be granted because, as it now stands, the decision below grants powers to management which nearly 100 years of labor unrest had removed. Regardless of the outcome of this case, the manner by which nearly 2 million employees are to be governed in their day to day activities, should be the result of a decision of this Court after a full and careful examination of the ramifications of the decision upon the balance of labor and management power.

II. The Court Below Wrongly Decided That The RLA Does Not Afford An Employee With The Right To Request The Presence Of His Majority Union Representative At A Disciplinary Hearing.

The Seventh Circuit wrongly decided the case below because it failed to properly construe the language of the RLA, it relied upon immaterial precedent, and it failed to give deference to the holdings of this Court.

1. This Court has long held that Congress should be presumed to say in a statute what it means and mean in a statute what it says. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). If a statute is unambiguous, the Congressional intent, embodied in plain words, must be enforced. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 48, 56 (1987); *U.S. v. Clark*, 454 U.S. 555, 560 (1982).

Section 152 Second of the RLA provides that "all disputes . . . shall be considered and, if possible, decided, with all expedition, in conference between representatives designated . . . by the carrier . . . and by the employee thereof interested in the dispute." 45 U.S.C. § 152 Second.

Plainly, Congress used the words "all disputes," not some disputes, and certainly not the word "grievances" in § 152 Second. The Court below reasoned that a "dispute" does not arise under the RLA until after a grievance has been filed. App. 12. Not only does this argument put the cart before the horse, but it is in conflict with the statutory scheme. To contend that a "dispute" does not arise until a "grievance" is filed is akin to contending that a "cause of action" does not accrue until a "lawsuit" has

been filed. It is the fact that a dispute exists and is unresolved which gives rise to the need for a grievance to be filed. A grievance is no more than the informal institution of a internally resolved lawsuit.[1] An unresolved disagreement between the parties must exist to give a basis for the prosecution of the grievance. As discussed above, it was the intent of Congress that disputes be handled expeditiously and non-contentiously. By compelling early negotiation of disputes, majority unions could more readily monitor the implementation of the contract and disagreements possibly could be resolved without further escalation.

Congress certainly viewed the term "disputes" in the RLA to include matters of greater scope than merely grievances. In Section 152 First, Congress imposed the obligation that "it shall be the duty of all carriers . . . to maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreement *or otherwise* . . . " (emphasis added). Furthermore, Congress specifically used the term "grievance" in § 152 Sixth of the Act. There Congress set a specific time limit within which "grievances" must be considered; namely 10 days

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[1] The common definition of "dispute" is "a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other." In contrast, the term "grievance" is much more formalistic. "In labor law, a complaint filed by an employee or union representative regarding working conditions and for resolution of which there is procedural machinery provided in the union contract." Black's Law Dictionary, abridged edition, pp. 296, 359 (1989).

after receipt of the "grievance." However, Congress also permitted a CBA between union and management to provide for a different manner of handling "grievances," once they have been filed. In contrast, § 152 Second requires conferences to resolve "disputes" to occur "with all expedition." The emphasis is on speed. There is a distinct difference between the manner by which "dispute" as opposed to "grievances" are treated under the RLA.[2]

The statutory scheme is quite logical if the purpose is to resolve disagreements quickly and amicably. If a disagreement, a dispute arises, an employee, by himself or with or through his representative, meets with management to confer, to jawbone, in an attempt to quickly resolve it. 45 U.S.C. § 152 Second. If the conference is unsuccessful and a more formal complaint must be filed, a grievance is filed and a grievance hearing is held within a minimum of ten days and a maximum of twenty days, or otherwise as agreed to by the parties pursuant to a CBA. 45 U.S.C. § 152 Sixth. If the disagreement still cannot be resolved, the matter is handled as it usually would be up to the Chief Operating Officer. 45 U.S.C. § 153 First (i). If the disagreement is still unresolved, it can be taken up for arbitration. 45 U.S.C. § 153 First. This interpretation is logical, reasonable, orderly, and serves the statutory purpose.

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[2] The Court below referred to the provisions of Section 152 Sixth and Section 153 First (i) as circumscribing the rights created by § 152 Second. App. 11-12. However, this Court in *Burley I* has already rejected any limitation imposed by § 152 Second as infringing on the "fundamental right" created by that section. 325 U.S. 735.

2. The Court below erred in its construction of the statutory scheme by solely focusing on the concern that to grant employees a right to representation at the dispute creation stage "would essentially mandate a particular statutory procedure whenever an employee had a disagreement with th railroad." App. 8. The Seventh Circuit then improperly mixed the notions of an ability of a carrier to discharge and the manner by which an investigation hearing is conducted with the right of a union representational presence at a hearing. App. 8-9.

First, the presence of a majority union representative at a hearing does not dictate the way the hearing is conducted nor does it limit the carrier's discretion to discharge. The representative is an observer to see whether the employee's and the union's rights are being followed by management.

Second, this Court has already held that a CBA cannot abrogate employee rights which are created in § 152 Second. So to the extent the Court below was concerned that § 152 Second might constrain the provisions of a CBA, this Court has already held that it can. In *Burley I*, the union there contended that its CBA excluded the right of an employee to present his own disputes to management and to resolve them without the involvement of the union. This Court held that "the individual employee's rights [under the RLA] cannot be nullified merely by agreement between the carrier and the union. They are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf." *Burley I*,

327 U.S. 661 (1946).[3] The linchpin of the reasoning of the Court below, that § 152 Second creates no rights which can supersede a CBA, is at odds with this Court's holding

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[3] It is quite ironic that the Court below concluded that majority union representatives have no right to be present at investigatory hearings. Partly why this Court's decision in the *Burley* cases were such landmark decisions in carrier labor relations, was that it had been the common practice, prior to *Burley I* and *II*, to allow only union representatives, not the employees, at initial disciplinary meetings. *See Letter of the Brotherhood of Locomotive Engineers and Railroad Trainmen*, reprinted in dissent in *Elgin, J. & E. Ry. Co. v. Burley*, 327 U.S. 661, 670 (1946) (*Burley II*). "Representatives of employees have the statutory right and duty (to confer with management respecting all disputes (§ 2 Second) and specifically those arising out of grievances or out of the interpretation or application of agreements (§ 2 Sixth.)" The Railway Labor Executives Association and American Federation of Labor made the following comments to the *Burley II* Court "[W]e submit that the regulatory scheme of the Railway Labor Act requires for its effective operation a recognized authority in the collective bargaining representative to proceed in its own right to adjust disputes regarding the interpretation or application of agreements. . . . Thousands of individual cases have been settled during this period and up to the time of the decision in this case, no one has questioned the authority of the employees representatives to act in this connection. The existence of such authority has always been considered as an integral and essential party of the collective bargaining process as it has developed under federal regulation." *Burley II*, 327 U.S. 661, 671 (dissent, J. Frankfurter). The concern of the unions, at the time, was that without representation at the initial disciplinary hearing, an employee could negotiate a solution which would be inconsistent with the majority union's interpretation of the contract and thus would act detrimentally towards the interests of other employees. The irony here is that the Court below has reversed what had been the commonly accepted notion of what

that a CBA cannot abrogate the rights created by § 152 Second.

The Court below buttressed its decision by relying on its earlier decisions in *Broady v. Illinois Cent. R. Co.*, 191 F.2d 73 (7th Cir. 1951); *Edwards v. St. Louis-San Francisco Railroad Co.*, 361 F.2d 946 (7th Cir. 1966); and *Kulavic v. Chicago & Illinois Midland Railway Co.*, 1 F.3d 507 (7th Cir. 1993). However, those decisions were all defective because they did not involve a question of the representation rights of an employee under § 152 Second and, more importantly, they ignored, or did not consider, this Court's ruling in *Burley I*. Indeed, the Seventh Circuit, itself, acknowledged the questionable nature of its decisions in *Broady, Edwards,* and *Kulavic,* in *McElroy v. Terminal Railroad Assoc. of St. Louis,* 392 F.2d 966 (7th Cir. 1968), *cert. denied,* 342 U.S. 897 (1951). In *McElroy*, the Seventh Circuit, for the first time, reviewed the legislative history of the RLA, and particularly § 152 Second, reviewed this Court's rulings, and scholarly commentary, and concluded that § 152 Second did grant rights to an employee to request representation from co-majority unions. Accord *Slagley v. Illinois Central Railroad Co.*, 397 F.2d 546 (7th Cir. 1968) ("Employees interested in minor disputes have the statutory right to designate their representatives for the 'on the property' procedures and before the Adjustment Board."); *Air Line Pilots Ass'n v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986).

The Seventh Circuit chose not to apply *McElroy* to this matter (which it did not reverse), choosing to rely on

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Section 152 Second was intended to afford as protection to both employees and to majority unions.

the older precedent, which older precedent it had previously acknowledged in *McElroy* was questionable. The Court below did this because it was unsure whether *McElroy* was still viable in light of this Court's decision in *Landers, supra,* even though it also acknowledged that "nothing in *Landers* indicates that § 152 does not guarantee any right to majority union representation for the resolution of disputes." App. 8 n.4.

In *Landers, supra,* this Court held that § 152 Second did not afford an employee the right to the presence of a minority union representative at a disciplinary hearing. With all due respect to the Court below, the Seventh Circuit took this Court's decision in *Landers* and turned it on its head. This Court ruled that an employee had no right to minority representation under § 152 Second because it would interfere with the rights of the majority union. "[M]any disputes might be resolved less expeditiously, or not at all, if employees had a statutory right to be represented at the company level by minority unions, which do not have the same established relationship with the employer as do official bargaining representatives or the same familiarity with how similar disputes have been resolved in the past." 485 U.S. at 656. Indeed, this Court responded to the employee's concern in *Landers* that he would be unrepresented at disciplinary hearings by noting that he would be adequately represented by the majority union representative. "[A]t grievance and disciplinary proceedings conducted on the Amtrak property, it is appropriate to assume that petitioner's interests will be adequately represented by the BLE [majority union] which owes the same duty of fair representation to all members of the bargaining unit

regardless of their union affiliation." *Id.* at 658. The Court below never discussed the reasoning of this Court in *Landers* when it rendered its decision, choosing instead to rely on the reasoning of the lower court in *Landers*, which was not adopted by this Court.

This Court has consistently, and without fail, protected the rights afforded by § 152 Second. *Virginian Ry. Co., supra,* held that § 152 Second imposed affirmative mandatory duties upon management. *Broady I, supra,* held that the statutory provisions of § 152 Second protecting an employee could not be abrogated by contract. *Landers, supra,* held that a minority union representative could not be present at a disciplinary hearing because such action would interfere with the authority of the majority union to be present at the hearing. Despite the statutory language and the consistent guidance from this Court, the Seventh Circuit below has held that there is no right to a majority union presence at a disciplinary hearing. Respectfully, at least from the apparent face of this Court's precedent, the Court below is wrong. Whether this Court chooses to change its prior rulings by affirming the decision below or chooses to adhere to a 62 year unbroken line of precedent and dealings within the industry by reversing the decision below, for the sake of clarity on an issue which affects the daily lives of nearly 2,000,000 citizens, this Court should make the final determination.

CONCLUSION

Given the finiteness of time and the limits of resources, in deciding whether or not to grant a writ of certiorari several questions must come to the mind of this Court. First, is the case of a factual type which allows a definitive ruling or is it so laced with facts as to be easily distinguished? Second, does the case permit a definitive legal ruling or would the decision be likely to be laced with general directives that could allow for deviation in the courts below. Third, is the case of practical importance, that is, will a ruling affect just one individual, potentially more than one depending on circumstances, or would the ruling definitely affect the manner in which the nation conducts its business? Conversely, fourth, would the failure to rule on the case, by the inactivity itself, result in alteration of the way in which the nation conducts its business. Fifth, and finally, but most importantly, since the business of jurisprudence is to do justice, would considering the case result in justice both individually and collectively?

This case meets all these tests. This case provides a stark setting of facts which allows of no deviation – the request of a majority union representative by an employee to be present at a hearing when action is contemplated by management. A legal ruling in the case, one way or the other, could be couched in clear language – either § 152 Second, and associated sections, grant a right of majority union representation or they do not. The case is of practical importance because literally millions of employees who are subject to the RLA are affected by whether or not they can have their majority union representative approach

their management over a disagreement without first having to initiate a formal grievance process. The failure to consider the case also has practical effects because the Court below did not reverse its prior opinions and the National Adjustment Review Board sits within the jurisdiction of the Seventh Circuit and looks to its decisions as guidance. In light of the holding in this case, the continued viability of *McElroy*, and the decisions of this Court, rather than meet the RLA's goals of predictability, labor relations are now unpredictable. Lastly, considering this case would be just, regardless of outcome, for both the Petitioner and the public. Even the Court below acknowledged that, on its face, "§ 152 Second may well guarantee some right to union representation in dispute resolution conferences at the company level." App. 8 and n.4. In light of the precedent from this Court, the apparent language of the statute, and the apparent manner by which for years the right of majority union representation was assumed to exist, it is only right and just that, whatever the final answer may be, an answer affecting the manner by which labor and management govern their behavior in the airline and rail industries comes from this Court.

Respectfully, the Petitioner Raymond Pawlowski requests that this Court issue a Writ of Certiorari to the Seventh Circuit Court of Appeals in this matter.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

for the Seventh Circuit

No. 98-4287

RAYMOND E. PAWLOWSKI,

Plaintiff-Appellant,

v.

NORTHEAST ILLINOIS REGIONAL
COMMUTER RAILROAD CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 1893 – **Robert W. Gettleman,** *Judge.*

ARGUED MAY 19, 1999 – DECIDED AUGUST 9, 1999

Before HARLINGTON WOOD, JR., FLAUM, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* Raymond E. Pawlowski, a former railroad police officer, asks us to determine whether the Railway Labor Act ("RLA" or "Act"), 45 U.S.C. § 151 et seq., entitled him to union representation at an investigative interview conducted by his former employer, the Northeast Illinois Regional Commuter Railroad Corporation d/b/a Metra ("Metra"). The district court dismissed Pawlowski's claim, holding that because the RLA conferred no right to representation at initial hearings, and

because the RLA appeal process pre-empted consideration of any right that might have been conferred by the applicable collective bargaining agreement ("CBA"), the court had no jurisdiction over this aspect of the claim. We affirm.

Background

In early 1997, Raymond Pawlowski left his job as a railroad police officer for Amtrak and went to work for Metra in the same capacity. On July 25, 1997, Pawlowski was called into Metra police headquarters and questioned at length by his supervisors about a gun they suspected he had received from another employee and was holding in violation of company regulations. Although Pawlowski requested union or attorney representation during this questioning, Metra supervisors refused to allow either and threatened that if he left the headquarters he would be fired immediately. Pawlowski stayed and answered the questions. On July 28, 1997, Metra sent him a letter announcing his termination, which Pawlowski alleges, was based on statements he made during the interview. Through the Railroad Special Agents & Police Officers Section, Allied Services Division/TCU, AFL-CIO ("Union"), Pawlowski's union and designated collective bargaining representative, Pawlowski appealed the firing to Metra's Manager of Labor Relations, who ultimately upheld the termination decision.

Pawlowski did not pursue his appeal to the National Railroad Adjustment Board ("Adjustment Board"), an entity set up by the RLA to resolve work-related disputes between railroads and their employees. Instead, he sued

Metra for damages and reinstatement, claiming that the denial of his request for union representation during the questioning on July 25, 1997, violated his rights under the RLA. After Metra moved to dismiss the claim pursuant to Fed.R.Civ.P. 12(b)(6), the district court held that, although the RLA provided for representation of an employee's choice during Adjustment Board proceedings, see 45 U.S.C. § 153, the statute did not create similar rights for employees at informal proceedings on the employer's property. The court reasoned that if Pawlowski possessed such a right, it sprang from the CBA between Metra and the Union, not the RLA itself. Because the interpretation of railroad CBAs is within the exclusive jurisdiction of the Adjustment Board, see 45 U.S.C. § 153, the court concluded that it would have no jurisdiction over this aspect of Pawlowski's claim. *See Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 322 (1972) (where the source of railroad employee's claimed right not to be discharged was a provision in CBA, employee who had not pursued his administrative remedies under RLA could not bring court action against railroad); *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 328 (1969).

Discussion

On appeal, Pawlowski argues that the district court construed the representational rights conferred by the RLA too narrowly in dismissing his claim. We review dismissal under Rule 12(b)(6) de novo, keeping in mind that such a grant is appropriate only if "it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Craigs, Inc. v. General Elec. Capital Corp.*, 12 F.3d 686, 688 (7th Cir. 1993);

see also Hentosh v. Herman M. Finch Univ. of Health Sciences/The Chicago Medical School, 167 F.3d 1170, 1173 (7th Cir. 1999) (in reviewing 12(b)(6) decision we assume all well-pleaded facts as true, looking at them in a light most favorable to the plaintiff). If the statute under which the plaintiff sued provides no relief in the circumstances alleged, the district court's decision was appropriate. Therefore, the sole issue on appeal is whether the RLA affords a railroad employee the statutory right to union representation during initial investigative questioning by the employer concerning a possible violation of company regulations.[1]

To answer this question, some understanding of the RLA's structure is required. Congress enacted the statute in 1926 to provide an administrative framework for the peaceful resolution of labor disputes in the railroad industry. *See Kulavic v. Chicago & Illinois Midland Railway Co.*, 1 F.3d 507, 512 (7th Cir. 1993). Under the Act, disputes are categorized as either major or minor depending on the subject matter. *See Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 722 (1945) ("*Burley I*"). Major disputes involve the formation or alteration of collective bargaining agreements, while minor disputes concern grievances arising from, or covered by, existing agreements. *Id.; see*

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[1] On appeal Pawlowski depends solely on rights created by the RLA and does not argue that the representational rights he claims were conferred by the CBA. Because we need not interpret the terms of the CBA, but can confine our inquiry to the statute itself, we have jurisdiction under 28 U.S.C. § 1337. *See Graf v. Elgin, Joliet and Eastern Ry. Company*, 697 F.2d 771, 774 (7th Cir. 1983).

Kulavic, 1 F.3d at 512 (defining minor disputes as "grievances that arise daily between employers and carriers regarding rates of pay, rules, and working conditions").[2] The RLA contains distinct procedural avenues for the resolution of each type of dispute. Because the subject of Pawlowski's claim cannot be categorized as major, we focus only on the framework relevant to minor disputes.

Parties can appeal unresolved minor disputes to the Adjustment Board for binding arbitration. *See Kulavic*, 1 F.3d at 512. Section 153 First describes the Adjustment Board review process and specifies that employees are entitled to the representation of their choice at Board proceedings. *See* 45 U.S.C. § 153 First (j). Prior to appeal, however, the RLA does not prescribe any specific procedures for dealing with disputes at the company level. Instead, Section 153 First (j) states:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes[.]

45 U.S.C. § 153 First (i). The "usual manner" has been interpreted to mean that minor disputes are handled at the company level according to procedures established by the railroad and the union through the CBA rather than

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[2] Although minor disputes generally involve the interpretation of an existing agreement, they can also include claims not specifically covered by those agreements, such as claims for personal injury. *See Burley I*, 325 U.S. at 723.

by the RLA. *See Kulavic*, 1 F.3d at 513; *Edwards v. St. Louis-San Francisco Railroad Co.*, 361 F.2d 946, 953 (7th Cir. 1966); *Broady v. Illinois Cent. R. Co.*, 191 F.2d 73, 77 (7th Cir. 1951); *see also Landers v. National Railroad Passenger Corp.*, 814 F.2d 41, 44 (1st Cir. 1987) (*aff'd*, 485 U.S. 652 (1988)) ("In investigations, conferences or hearings by or before officers of the carrier an existing legal contract [CBA] controls, whereas the procedure before the Board is controlled by the statute.") (quotation omitted).

In this case, although the CBA between Metra and the Union provided that police officers were entitled to the presence of Union representatives at certain disciplinary hearings, it is not clear whether that right extends to initial investigative questioning. Also, it applies only to officers who have been with the railroad for over a year but says nothing about the representational rights of employees like Pawlowski, who had been with the company for less than a year when he was fired.

Pawlowski maintains that the RLA itself, not the CBA, guaranteed him the representational rights he seeks to vindicate, and he points to the language of § 152 Second for support. That provision states:

> All disputes between a carrier or carriers and its employees shall be considered, and, if possible, decided with all expedition, in conference between the representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

45 U.S.C. § 152 Second.[3] Pawlowski asserts that this language clearly establishes that employees are entitled to union representation ("representatives designated") whenever they are in conflict with the railroad ("all disputes"). He insists that this necessarily includes the procedural right to the presence of the Union during Metra's questioning about a potential work rule violation. That the CBA does not also provide him with such a right is irrelevant, he concludes, because the terms of a CBA may not deprive railroad employees of their statutory rights. *See Burley I*, 325 U.S. at 740 n.39 ("[T]he individual employees's [statutory] rights cannot be nullified merely by agreement between the carrier and the union.").

Pawlowski concedes that he was represented by the Union when he challenged the termination decision, and that Metra considered – but ultimately denied – his request to have it overturned. We also note that although Pawlowski chose not to appeal Metra's decision to the Adjustment Board, he has alleged nothing that suggests he would not have received his full representational

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[3] Pawlowski also insists that Sections 153 Third and Fourth afforded him the right to union representation during the July 25th questioning. However, these provisions relate to railroad employees' right to select a collective bargaining representative (Third) and join a collective bargaining unit (Fourth) without interference from the employer. *See Herring v. Delta Air Lines*, 894 F.2d 1020, 1022-23 (9th Cir. 1990). Pawlowski has pointed to no authority suggesting that either section provides for the kind of representational rights he claims. Because neither Pawlowski's right to join the Union nor his right to select it as his collective bargaining representative is at issue here, we need not address those provisions and may instead concentrate on Pawlowski's argument relating to § 152 Second.

rights before the Board. See 45 U.S.C. § 153 First(j). Instead, Pawlowski's claim is that his right to representation under § 152 Second arose immediately upon being called into Metra headquarters for questioning; that the right was violated when the railroad refused to suspend the questioning or allow him to call the Union; and that the RLA affords him a statutory remedy for this procedural violation.

While § 152 Second may well guarantee some right to union representation in dispute resolution conferences at the company level, *see McElroy v. Terminal Railroad Assoc.*, 392 F.2d 966, 969 (7th Cir. 1968),[4] we reject Pawlowski's argument. To accept it would essentially mandate a particular statutory procedure whenever an employee had a disagreement with the railroad. This runs counter to the long line of cases from this and other courts holding that

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[4] In *McElroy* we held that railroad employees who had obtained seniority status as both firemen and as engineers, but who were members of the firemen's union only, had the right to be represented in minor disputes by the firemen's union despite the fact that the engineer's union was their designated collective bargaining representative. 392 F.2d at 971. Among the reasons supporting that decision was our observation that, "on its face, [§ 152 Second] guarantees an individual employee the right to prosecute his grievances through any representative of his choice." *Id.* at 969. We note that the continued validity of the precise holding of *McElroy* is in doubt after the Supreme Court's decision in *Landers v. National Railroad Passengers Co.*, 485 U.S. 653 (1988), which held that § 152 did not establish a right to minority union representation in company-level grievance and disciplinary proceedings. *Id.* at 656. However, nothing in *Landers* indicates that § 152 does not guarantee any right to majority union representation for the resolution of disputes.

the RLA does not alter an employer's ability to investigate, discipline or discharge a railroad employee, nor does it dictate any specific statutory procedures that must be followed at the company level. As this court has stated:

> The provisions of the Railway Labor Act govern neither the procedure by which a carrier may discharge its employees nor the conduct of an investigation hearing on railroad property.
>
> * * *
>
> [T]he [provisions of the] statute make it quite evident that 'the Railway Labor Act does not empower the courts to enforce against the railroad any prescribed procedure for investigating and discharging its employees'

Edwards, 361 F.2d at 953 (quoting *Brooks v. Chicago R.I. & P.R. Co.*, 177 F.2d 385, 391 (8th Cir. 1948)); *see Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515-59 ("The provisions of the Railway Labor Act . . . do not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them.") (quotation omitted); *Broady*, 191 F.2d at 77 (same); *see also Kulavic*, 1 F.3d at 513 ("CBAs are not required to contain a standard set of guarantees for investigative hearings.").

The notion that the RLA does not dictate specific procedures at the company level necessarily applies to § 152 Second. *See Landers v. National Railroad Passenger Co.*, 814 F.2d 41, 44 (1st Cir. 1987), *aff'd*, 485 U.S. 652 (1988). As the First Circuit observed in one of the few cases dealing directly with representational rights under § 152 Second:

> Section 152 Second spells out the overall duties of carriers, employees, and labor unions. It comprises a broadly general reference to the many kinds of controversies that might arise, not to specific procedures or to particular rights in dispute resolution between parties. As the Supreme Court declared, the statute "merely states the policy which . . . other provisions buttress with more particularized commands."

Landers, 814 F.2d at 44 (quoting *General Comm. of Adjustment of the Bhd. of Locomotive Engineers of the Mo.-Kan.-Tex.R.R. v. Missouri-Kan.-Tex.R.R.*, 320 U.S. 323, 334 (1943)).[5]

We read § 152 Second as imposing only a general duty on railroads to afford their employees the opportunity to meet and discuss their grievances through a union representative. *See Edwards*, 361 F.2d at 953.[6] Yet railroads and unions remain free to establish by agreement the procedures for investigative and disciplinary proceedings at the company level. *See Landers*, 814 F.2d at

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[5] As the district court observed, the holding in *Landers* (later affirmed by the Supreme Court, *see* 485 U.S. 652 (1988)), is not directly applicable to Pawlowski's claim for majority union representation because it dealt with an employee's right to be represented by a minority union. 814 F.2d at 44. Yet that court's observations about the role of § 152 Second are relevant to our determination that that provision does not prescribe specific procedures for company-level proceedings.

[6] We emphasize that we are discussing only the minimum statutory rights conferred by Section 152 Second. Parties covered by the RLA are obviously free to bargain for more extensive representational rights in their CBA – something Metra and the Union apparently chose not to do, at least with respect to employees in Pawlowski's position.

44. The parties may choose to provide railroad employees with more extensive representational rights during those proceedings, *see Kulavic*, 1 F.3d at 515, but so long as the right to confer over disputes arising from them is preserved, the RLA is not offended.

Our conclusion is supported by § 152 Sixth, even though it appears at first blush to mandate a specific statutory procedure for triggering the right to conference through a representative discussed in § 152 Second.[7] Section 152 Sixth states that when a dispute arises over a grievance or work-related complaint, the employer has a duty to meet in conference with the complaining employee's representative within ten days of receiving notice of the employee's desire to confer, and the time and place of the proposed conference. However, § 152 Sixth goes on to state that where a CBA is in place, none of these statutory procedures should be read to supersede

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[7] Section 152 Sixth states in relevant part:

> In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation of or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: . . . *And further* provided, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

45 U.S.C. § 152 Second (emphasis in original).

those established by agreement for handling disputes at the company level. *Id.* This reference to the CBA-created dispute and grievance mechanisms reinforces our conclusion that they, rather than the RLA, establish the procedures by which the right to representation arises. It also indicates that where such an agreement is in place, the invocation of that agreement's grievance procedure is a necessary pre-requisite to any statutory right to a conference with union representation under § 152 Second. *Id. See Kulavic,* 1 F.3d at 513; *Edwards,* 361 F.2d at 953, *Landers,* 814 F.2d at 44.

In this case, however, Pawlowski had not invoked any grievance procedure prior to the July 25th questioning. He appears to confuse Metra's investigative interview with a § 152 Second conference when he argues that, because he was denied representation at the questioning, the rights conferred by statute were violated. Yet this puts the cart before the horse. Pawlowski's dispute arose out of the interview; the interview was not a hearing about his dispute. Thus whatever statutory right to representation he possessed had not yet been triggered, because he had not yet invoked the grievance procedures in the CBA. *See Kotakis v. Elgin, Joliet & Eastern Ry. Co.,* 520 F.2d 570, 575 (7th Cir. 1975) (contractual right to representation not triggered prior to plaintiff's invocation of formal grievance machinery under CBA).

A dispute within the meaning of § 152 Second arose for Pawlowski only after Metra informed him that he was being terminated for having violated company rules and he filed a grievance (in the form of an appeal) with

respect to that disciplinary action.[8] As noted above, Pawlowski was represented by the Union in his attempt to have it reversed. But while the RLA guaranteed Pawlowski that much representation, it did not by itself entitle him to more. Because Pawlowski was afforded the opportunity to confer through his Union over the dispute which arose from the July 25th questioning, his statutory rights were not violated.

Conclusion

We agree with the district court's decision that Pawlowski has failed to state a claim for relief under the RLA. Assuming the truth of his allegations, Metra's initial investigatory tactics appear heavy-handed, and may have violated the spirit, if not the terms, of the CBA. Yet Pawlowski did not appeal his employer's action to the Adjustment Board and he does not base his claim before us on his contractual rights. We conclude that because Metra conferred with the Union over Pawlowski's grievance once it was properly presented, and left open to the plaintiff the option of appealing the decision to the Adjustment Board, it fulfilled its statutory obligations

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[8] Alternatively, a dispute would have arisen had Pawlowski filed a grievance with Metra through the Union complaining that he was denied representation during the questioning in violation of the CBA. At that point, he may have had the statutory right to confer with Metra through the Union over this question. However, Pawlowski did not pursue this approach.

under the RLA. We therefore AFFIRM the district court's decision.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAYMOND E. PAWLOWSKI, Plaintiff, v. NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD CORPORATION, a public corporation, Defendant.	)	No. 98 C 1893 Judge Robert Gettleman

MEMORANDUM OPINION AND ORDER

Plaintiff Raymond E. Pawlowski ("Pawlowski") has filed a complaint alleging that defendant Northeast Illinois Regional Commuter Railroad Corporation d/b/a/ Metra ("Metra") has violated the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq., by preventing him from having a union representative present at an investigatory interview concerning an alleged violation by plaintiff of Metra's regulations concerning possession of a weapon. Defendant has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1), arguing that the court does not have jurisdiction because the RLA does not give plaintiff the right to representation at the initial interview.

Although plaintiff argues that the RLA's plain language and legislative history demonstrate that he has a statutory right to have a union representative present at his initial disciplinary hearing, he can point to nothing in

the statute or in the caselaw that supports this contention. The RLA does not prescribe disciplinary procedures for an initial hearing or otherwise interfere with a rail carrier's rights to discipline its employees. *See Edwards v. St. Louis-San Francisco R. Co.*, 361 F.2d 946, 953 (7th Cir. 1966) ("The provisions of the Railway Labor Act govern neither the procedure by which a carrier may discharge its employees nor the conduct of an investigation hearing on railroad property."). As the Seventh Circuit has held: "We can find no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials of a charge that the employee has violated company rules." *Broady v. Illinois Cent. R. Co.*, 191 F.2d 73, 76 (7th Cir. 1951).[1]

The RLA explicitly grants railroad employees the right to have a representative of their choice present during proceedings before the National Railroad Adjustment Board ("Adjustment Board"). *See* 45 U.S.C. § 153 First (j) (stating that when disputes reach the Adjustment Board, "[p]arties may be heard either in person, by counsel, or by other representatives, as they may respectively

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[1] Plaintiff argues that *Broady* is inapposite because the case merely held that the employee had no right to insist on being represented by the minority union representative. *Broady* does not hold, as plaintiff contends, that the RLA itself entitles an employee to majority union representation. Rather, *Broady* rests on the fact that the employee's right to representation was governed by the applicable collective bargaining agreement ("CBA"). *See Broady*, 191 F.2d at 76 ("In the case at bar, appellee's right to representation comes from the agreement of appellant and Dining Car Employees Union, local 351.").

elect . . . "). The Supreme Court has held that this explicit grant suggests that Congress did not believe that a similar right was necessary at an initial hearing. *See Landers v. National R.R. Passengers Corp.*, 485 U.S. 652, 656 (1988) ("That Congress expressly provided railroad employees with the right to the representative of their choice in Adjustment Board proceedings, but did not do so with regard to any earlier phase of the dispute resolution process, is persuasive evidence that Congress did not believe that the participation of minority unions or other outsiders in company-level proceedings was necessary to accomplish the purposes of the Act."). Although *Landers* addressed a different legal issue,[3] [sic] its reasoning is applicable to this case and suggests that the RLA does not grant employees the right to representation at an initial disciplinary hearing. The Seventh Circuit has likewise noted that any right to representation does not arise until an internal investigation is complete. *See Broady*, 191 F.2d at 77 ("It appears to us under the above provisions of the Railway Labor Act that the employee's right to representation thereunder, when an investigation o[f] a breach of company rules is involved, would arise only when the officials of the company have completed their inquiry

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[3] [sic] *Landers* addressed the issue of whether an employee has a statutory right to be represented by the union of his choice at initial grievance or disciplinary proceedings. 485 U.S. at 653. Because the CBA in *Landers* granted employees a contractual right to some union representation at the initial disciplinary hearing, *id.* at 654, the Supreme Court did not reach the question of whether, absent such a provision, an employee has a statutory right to representation, the issue before the court in the present case.

and entered a finding unsatisfactory to the accused employee.") (discussing 45 U.S.C. § 153 First (i), (j), (p)).

The procedure at an initial hearing is governed exclusively by the CBA between labor and management. *See Edwards*, 361 F.2d at 954 ("The federal courts are not the guarantors of any rights of either labor or management at the initial hearing, either by force of the Constitution or the Railway Labor Act, for, as we have said, at that stage the dispute is between private parties and the applicable procedure for settling the dispute is governed by the contract between them."). Plaintiff correctly argues that if a provision of the CBA violates an employee's statutory rights, the court has jurisdiction to invalidate the offending provision. *See, e.g., Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 740 n.39 (1945) ("[T]he individual employee's rights cannot be nullified merely by agreement between the carrier and the union. They are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf."). Because plaintiff had no statutory right to representation at the initial hearing, any such right would have to be contained in the CBA.

The court does not have jurisdiction to invalidate the procedures prescribed by the CBA absent some statutory right. *See McElroy v. Terminal Railroad Ass'n of St. Louis*, 392 F.2d 966, 971 (7th Cir. 1968) (distinguishing cases that allege that the CBA violated a statutory right from cases that challenge the CBA's grievance procedures, and determining that the former are justiciable even if the latter are not). The Adjustment Board is the only body that can

entertain plaintiff's challenge.[4] [sic] The Adjustment Board has virtually exclusive authority to interpret the CBA. *See Kotakis v. Elgin, J. & E. Ry. Co.*, 520 F.2d 570, 575 (7th Cir. 1975) ("the interpretation of railroad collective bargaining agreements is for the Adjustment Board rather than the courts"); *Edwards*, 361 F.2d at 952 ("[The Supreme] Court 'time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railway Adjustment Board.' Appellant, therefore, cannot come before this or the district court complaining that the . . . Railway Adjustment Board . . . incorrectly interpreted or wrongfully applied a provision of a collective bargaining agreement.") (quoting *Gunther v. San Diego & A.E. Ry. Co.*, 382 U.S. 257, 263 (1965)).[5] [sic]

Because plaintiff's claim depends on an interpretation of the CBA, over which this court has no jurisdiction, defendant's motion to dismiss is granted.

ENTER: December 2, 1998

/s/ Robert W. Gettleman
Robert W. Gettleman
United States District Judge

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[4] [sic] Plaintiff does not allege that he sought review of his dismissal before the Adjustment Board.

[5] [sic] The CBA in the instant case grants an employee who has been with the company for over one year the right to have two union representatives present at the disciplinary hearing, but says nothing about the representation rights of employees, such as plaintiff, who have been with the company for less than a year.